EON BANK BHD

v.

PUNG CHONG THAI

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[APPLICATION NO: 38-66-99]
23 OCTOBER 2000

CIVIL PROCEDURE: *Parties - Addition of new party - Application under O. 15 r. 6(2) Rules of the High Court 1980 - Whether O. 15 r. 6(2) applicable as there were no ongoing proceedings - Whether applicant had a direct legal interest in subject matter - Whether equitable principles applicable*

The applicant purchased a piece of land ('the land') at a public auction and paid the requisite deposit money. The land was charged to the plaintiff bank. Being unable to pay the balance of the purchase price within the time stipulated in the terms of the auction, he applied for an extension of time. The application was dismissed by the senior assistant registrar. He now applied to this court, pursuant to O. 15 r. 6 of the Rules of the High Court 1980 ('RHC') to be made a party to these proceedings.

The applicant averred that he was unable to pay the balance of the purchase price because he could not obtain a bank loan as the land was subject to eleven private caveats. He prayed that if he were made a party to the proceedings he would have the requisite *locus standi* to apply for an extension of time and to remove the caveats.

The plaintiff argued that the court was now *functus officio* as by way of the public auction, a fresh contract had been entered between the plaintiff and applicant. Also, that O. 15 r. 6(2) of the RHC was not applicable as there was no longer any ongoing proceedings to enable the applicant to intervene since the order for sale of the land was already made and the deposit paid.

Held:

[1] When the bidders to the public auction were advised to search for the existence of any caveats to the land to the auction, the search disclosed two private caveats. The plaintiff did not disclose that there were eleven caveats on the land prior to the auction. It was only after the subsequent search made by the applicant that revealed the existence of the caveats. As such, the applicant may raise the issue of non-disclosure of the caveats or may wish to set aside the order for sale on such or other grounds.

[2] Although O. 15 r. 6(2) of the RHC states that an application to intervene may not be made after final judgment has been entered, the applicant has an interest directly related to the subject matter. Thus, he not only had a legal interest in the matter, but also the principles of equity would allow him the right to intervene.

[3] As to the plaintiff's submission that the court had no right to extend the time for payment without the consent of the plaintiff, there were several conflicting authorities on this matter. Therefore, it was only proper that leave be given to the applicant to argue his case fully under O. 15 r. 6(2) of the RHC to intervene in these proceedings.

[Application allowed.]

Case(s) referred to:
Development & Commercial Bank Bhd, Johore Bahru v. Kim Ming Choon [1991] 1 CLJ 732 ***(refd)***
Hong Leong Finance Bhd v. Staghorn Sdn Bhd [1995] 3 CLJ 368 ***(refd)***
Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1990] 1 MLJ 317 ***(refd)***
Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***
Punca Klasik Sdn Bhd v. Abdul Aziz Abdul Hamid & Ors [1994] 1 CLJ 403 ***(refd)***
Tai Choi Yu v. Syarikat Tingan Lumber Sdn Bhd [1998] 4 CLJ 293 ***(dist)***

Legislation referred to:
Companies Act 1965, s. 218(1)(a)
National Land Code, s. 259(3)(a)
Rules of the High Court 1980, O. 15 rr. 6(2)(b)(i), (ii), O. 83

For the applicant/intervenor - Foo Li Mei; M/s David Chong & Co
For the respondent/plaintiff - Karen Kaur Bal; M/s BC Teh & Yeoh

Reported by Raja Vishnu

JUDGMENT

RK Nathan J:

Facts

The applicant is moving this court to be made a party to these proceedings pursuant to O. 15 r. 6 of the Rules of the High Court 1980. In his affidavit in support he has averred that as a director of Nirwana Institute he had on behalf of the said institute purchased land held under HS(D) 40108 No. PT 12550, Mukim Ampang, Daerah Hulu Langat, Negeri Selangor (the said land) at a public auction held by the High Court Kuala Lumpur for a purchase price of RM333,000 and had paid on 6 March 2000 a deposit of 10% amounting

to RM33,300. Pursuant to the terms of the auction he was to have paid the balance of the purchase price on or before 5 June 2000. Being unable to do so by the said date, the applicant on 2 June 2000 filed an application to extend the final date of payment by a further three months from 5 June 2000. This application was heard by the learned Senior Assistant Registrar (SAR) on 11 July 2000 who dismissed it with costs. To date there is no appeal to the Judge against this order. In the meantime, the applicant has filed this application (encl. 38) to enable him to be made a party.

Findings Of The Court

In support of encl. 38 the applicant has averred that in dismissing the earlier application on a preliminary issue the learned SAR had granted him leave to file an application to enable him to be made a party to the proceedings. The main thrust of the applicant's reason is that he has been unable to obtain a loan from any bank because of the existence of two private caveats lodged over the said land. He then made an official search which he exhibited and which disclosed the existence of eleven private caveats being lodged over the said land. It was on this score that he was compelled to file the earlier application. In spite of the caveats, he has since obtained from a leasing company an offer of a loan for RM250,000. The said offer letter was also exhibited. All he wants in this application is that he be made a party so that he can make an application to extend time to pay the balance. He would also have to apply to remove the caveats. He would only be able to do these if he had the locus standi and it was his case that he therefore ought to be made a party.

The plaintiff in opposing this application contended that I ought not to consider this application since O. 15 r. 6 will come into play in respect of any matter or proceeding and in this case there no longer was any matter or proceeding once an order for sale was made on 7 December 1998 and when the auction had been fixed for 24 January 2000. It was the case of the plaintiff that this court is now *functus officio* because on 6 April 2000 by way of a public auction a fresh contract has been entered into between the plaintiff and the applicant with fixed terms as contained in the proclamation of sale which was also exhibited. The bank argued that it was eligible to forfeit the deposit paid since more than three months had expired since the making of the order for sale and no settlement had been effected by the applicant.

Whilst I agree that the proclamation of sale discloses that the said property has been charged to the plaintiff and that there is a note in the proclamation of sale advising bidders at the public auction to make a search in the land office prior to the auction, I note that the subsequent search made by the applicant discloses the existence of eleven caveats. This has not been disclosed, nor explained in the proclamation of sale. After all, the applicant wishes to

be made a party to these proceedings. Since the plaintiff has also conceded in its submission that there is a fresh agreement by way of the order for sale entered into by the plaintiff and the applicant on the date of the public auction, the applicant might wish to raise the issue regarding the non-disclosure of the eleven caveats or he may wish to set aside the order for sale on such or other grounds. I am of the view that the applicant has indeed satisfied me that he has the *locus standi* to be made a party to these proceedings pursuant to O. 15 r. 6(2)(b)(i) and (ii) of the RHC, which reads as follows:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –
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> …
>
> (b) order any of the following persons to be added as a party, namely -
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
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> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

I am of the view that the Privy Council in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52 had expressed the rationale behind this order very succinctly in the words of Lord Diplock at p. 55, wherein his Lordship said:

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard.

In *Punca Klasik Sdn Bhd v. Abdul Aziz Abdul Hamid & Ors* [1994] 1 CLJ 403 the plaintiff, a successful bidder at a public auction, applied to remove 20 existing caveats over the said property on the basis of being an "aggrieved party". The court held that though the plaintiff might have had knowledge of

the existence of the 20 caveats earlier, that ought not to prevent the plaintiff from being an "aggrieved party" in law as something wrongful had been done to the plaintiff that affected its title to the property. It would seem therefore that the plaintiff in this case can, if he wants to, even apply to remove the caveats and for all of these he wishes to be made a party.

Ms. Karen Bal for the bank argued that since O. 15 r. 6(2) relates to an application being made "at any stage of the proceedings" "in any cause or matter", such a rule cannot apply to the situation before me since there was no longer any ongoing proceedings to enable the applicant to intervene, once the order for sale had been made, and the deposit paid. In support, counsel relied on a decision of the Court of Appeal in *Tai Choi Yu v. Syarikat Tingan Lumber Sdn Bhd* [1998] 4 CLJ 293 wherein the court had held, that although O. 15 r. 6(2) of the RHC states that an application to intervene could be made "at any stage of the proceedings", this does not mean that such application can be made after final judgment had been entered. In fact, in that case the Court of Appeal went further to hold that the applicant took out the application after judgment had been perfected. To my mind, *Tai Choi Yu* can easily be distinguished. There, the applicant, a minority shareholder in a company called New Tingan Timber Sdn Bhd (NTT) applied to intervene in a case where the respondent obtained judgment in default of appearance against NTT. When the statutory notice under s. 218(1)(a) of the Companies Act 1965 to wind up NTT was served on the company and the applicant minority shareholder, the latter called for a meeting of the board of directors of NTT. At that meeting it was resolved not to apply to set aside the judgment in default on the basis that NTT had no defence to the action and further that NTT was insolvent. Having been unable to persuade the board, the applicant on his own, applied to intervene. It was against these background facts that the Court of Appeal arrived at that decision. In fact, the Court of Appeal went further to hold that before the court could grant leave to intervene, an applicant must show that he has an interest directly related to the subject matter of the action and it was the opinion of the Court of Appeal that a mere shareholder, a *fortiori*, a minority shareholder has no such interest, legal or equitable, in the property of a company. The case before me is entirely different. The applicant is acting as the director of the Institute Nirwana, having directly entered into an agreement with the plaintiff bank which did not disclose that there were eleven caveats on the said land. The applicant now wants to intervene. In my judgment he has a legal interest not a mere commercial interest. Even principles of equity will demand that I allow him the right to intervene. Once he intervenes and makes whatever application, the plaintiff bank can then oppose that application at that stage, if it wishes to do so. In support of the "at any stage of the proceedings" argument, the plaintiff referred me to yet

another decision of the Court of Appeal in *Hong Leong Finance Bhd v. Staghorn Sdn Bhd* [1995] 3 CLJ 368. In that case a bidder at a public auction paid the applicant the full purchase price for the said land bought at a public auction. A certificate of sale was then issued in accordance with s. 259(3)(a) of the National Land Code 1965 (the NLC) by the Registrar of the High Court. Almost two years later the respondent (Staghorn) filed an application for leave to intervene in the proceedings to set aside the sale. The court held and rightly too, that the issuance of the certificate of sale by the High Court Registrar pursuant to s. 259(3)(a) of the NLC was the final stage of the proceedings for an order for sale under O. 83 of the RHC. In the circumstances, the Court of Appeal held that the order for intervention granted by the High Court had not been made "at any stage of the proceedings" as required by O. 15 r. 6(2) of the RHC. Here there is no evidence that the certificate of sale has been issued. In any case, it cannot be issued pursuant to s. 259(3)(a) of the NLC since the full purchase price has not been paid as yet.

I note that by a letter dated 25 March 2000 the plaintiff addressed a letter directly to the applicant and informed him that since the final date for the payment of the balance of the purchase price of RM299,700 was 5 June 2000, the plaintiff could forfeit the said sum after that date. To a question from the court, Ms. Karen Bal for the bank confirmed that the bank has not as yet forfeited the said sum. To my mind, the non-forfeiture by the plaintiff must be given some meaning. Even assuming it is indulgence, there was no requirement to do that. On the contrary, once indulgence is given then it must be construed that the plaintiff was willing to allow the applicant to pursue his right to intervene.

Counsel for the bank relied on *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1990] 1 MLJ 317 and urged me to hold that this court will have no right to extend the time for completion without the consent of the chargee. In that case after the final date for payment had expired, the successful bidder obtained an *ex parte* order before the Senior Assistant Registrar, granting a period of extension and before that extended period could expire, the successful bidder paid the balance. The plaintiff's application to set aside the *ex parte* order was dismissed. On appeal the learned judge held that the learned SAR ought not to have entertained the *ex parte* application. However in *Development & Commercial Bank Bhd, Johore Bahru v. Kim Ming Choon* [1991] 1 CLJ 732 another High Court held that the learned SAR had no power to entertain any application to vary the final date of completion and that such an application ought to be made before the learned judge. Whilst the court in *Liew Yet Lan* held that the chargee ought to be consulted, the court in *Kim Ming Choon* has held that any variation of the date of final completion would affect the chargor and he should be heard as he would be

the affected party who would have "to bear further interest charges levied by the chargee". Faced with these conflicting decisions it is only proper that leave be given to the applicant to argue his case fully.

Having considered this matter fully it is my judgment that the applicant ought to be given leave under O. 15 r. 6(2) of the RHC to intervene in these proceedings and that the costs be borne by the applicant himself.